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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JERVIS J. WATTLES,
Petitioner,

vs.

CITY OF TROY,
a Michigan municipal corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

AND APPENDIX

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QUESTIONS PRESENTED

I.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY'S REQUIREMENT THAT WATTLES USE HIS PROPERTY AS A RETENTION BASIN IS A TAKING?

II.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY PROMISED JERVIS WATTLES THAT THE USE OF HIS PROPERTY AS A RETENTION BASIN WOULD BE TEMPORARY?

III.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY HAS AN ENFORCEABLE INTEREST IN THE RETENTION BASIN?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Statement of Order Appealed From and Relief Sought 1

Grounds for Supreme Court Jurisdiction 1

Constitutional Issues Raised 2

Statement of Material Proceedings and Facts 2

Procedural Background 6

Concise Argument for a Writ of Certiorari 8

Reasons for Granting the Writ:

I. DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY'S REQUIREMENT THAT WATTLES USE HIS PROPERTY AS A RETENTION BASIN IS A TAKING? 8

A. Did Jervis Wattles Dedicate His Property To The City Of Troy? 8

B. Can The City Take Private Property To Further A "Police Power Objective" Without Compensating The Property Owner? 10

II. DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY PROMISED JERVIS WATTLES THAT THE USE OF HIS PROPERTY AS A RETENTION BASIN WOULD BE TEMPORARY? ... 13

III. DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY HAS AN ENFORCEABLE INTEREST IN THE RETENTION BASIN? .. 15

Conclusion 19

Relief Sought 20

Page

APPENDIX:

Appendix A – OPINION AND ORDER: State of Michigan Circuit Court, Oakland County (*1/4/90*) A-1

Appendix B – OPINION: State of Michigan Court of Appeals (*6/9/92*) A-4

Appendix C – ORDER DENYING LEAVE TO APPEAL: State of Michigan Supreme Court (*12/2/92*) A-8

TABLE OF AUTHORITIES

Cases:

Dunnan & Jeffrey, Inc. v. *Gross Telecasting, Inc.*, 7 Mich App 113 (1967) 15

Erkileman v. *Devletion*, 299 Mich 95; 299 NW 821 (1941) 17

Hansman v. *Imlay City Bank*, 121 Mich App 424 (1982) 6

In Re Brewster Street Housing, 291 Mich 313; 289 NW 493 (1939) 12

Lucas v. *South Carolina Coastal Council*, 112 Sup Ct 2886 (1992) 8, 12

Sattler v. *Fisher Contracting Co.*, 30 Mich App 617 (1971) 17

Vergote v. *K-Mart Corporation*, 125 Mich App 48 (1983) 13

PAGE

Statutes:

MCL 560.19 ..... 4, 9, 10, 18, 19

MCLA 560.12 ..... 4, 16

Court Rule:

MCR 2.116(C)(10) 5, 6

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Petitioner Jervis J. Wattles seeks a writ of certiorari from the Michigan Supreme Court *Order* entered December 2, 1992 which affirmed the Michigan Court of Appeals' *Opinion* entered June 9, 1992.

Wattles seeks the issuance of a writ of certiorari placing the issues raised herein before the U.S. Supreme Court, and ultimately remanding to the Oakland County Circuit Court for entry of an Order granting summary disposition in favor of Wattles or, in the alternative, for trial on the merits.

GROUNDS FOR SUPREME COURT JURISDICTION

The date of entry of the Michigan Supreme Court Order denying Petitioner's Leave to Appeal from the Michigan Court of Appeals was December 2, 1992.

This Court's jurisdiction is based upon Petitioner's denial of his rights under the Fifth Amendment of the

U.S. Constitution due to the Respondent's uncompounded taking of Petitioner's property.

CONSTITUTIONAL ISSUES RAISED

U.S. Constitution, Amendment 5:

> "AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> U.S. Constitution, Amendment 5

This Court's statutory jurisdiction is provided in 28 U.S.C.A. § 1257(3).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Jervis J. Wattles is the owner of a parcel of land described as the southerly 3.8 acres of Lot 11 of Maplelawn Industrial Park Subdivision No. 2, City of Troy, Oakland County, Michigan.

Maplelawn Industrial Park No. 2 was created in 1966 by M&W Development Company. The sole shareholders of M&W Development Company were Jervis J. Wattles and Paul B. Moffett. Paul B. Moffett died in 1988 and the land is now owned solely by Jervis J. Wattles.

At the time of the creation of Maplelawn Industrial Park No. 2, Wattles and Moffett allowed the southerly 3.8 acres of Lot 11 to be used as a temporary retention basis. It is this 3.8 acres which is the subject matter of the present lawsuit.

Prior to submission of the final proposed plat of Maplelawn Industrial Park No. 2, Jervis J. Wattles, Paul D. Moffett and Neree Alix, an independent engineer working for Wattles and Moffett, had conversations with the Troy City Engineer, Richard Graham, concerning storm water drainage. During these discussions, Mr. Graham informed Wattles and Moffett that a retention basis would have to be built on the industrial park in order to handle excess storm drainage. Mr. Graham informed Wattles and Moffett that the retention basin would only be a temporary requirement until storm water drains were developed along Crooks Road.

Specifically, at his deposition on August 6, 1987, Jervis Wattles testified that during meetings prior to the subdivision of Maplelawn Industrial Park No. 2 in approximately 1965, the Troy City Engineer's Office stated the retention basin would be a temporary requirement until sewers were opened on Crooks Road. Wattles further testified this information came from Richard Graham, Troy City Engineer.

At the time of the creation of Maplelawn Industrial Park No. 2, the Plat Act was in effect. Section 19(a) allowed a governing body to reject a plat if it did not provide for adequate storm drainage facilities:

> "In determining the suitability of the land for platting purposes, the governing body shall give due consideration to adequate storm water drainage facilities, both within the lands proposed for platting, and to the outlet drainage facilities to carry storm water from the land as platted. If the governing body determines that adequate storm drainage facilities are not provided for within the land proposed for platting or that adequate outlet storm drainage facilities are not available adjacent thereto, it may reject the plat . . . . *In its certificate of approval, if granted, the governing body shall specify the plat as approved complies with the provisions of this section,* (Added 1961, Act 150, Eff. Sept. 8.)"
>
> MCL 560.19(a) (emphasis added)

Section 12 of the Plat Act required any dedication of land within the plat to be set forth on the plat.

> "There shall be printed on each plat a form of dedication, stating the name of the plat, that the lands embraced in it have been surveyed and platted and that the public streets, alleys and other public places shown on it are dedicated to the use of the public, that all public utility easements shall be marked 'private easements' and are not dedicated to the use of the public . . ."
>
> MCLA 560.12

On March 14, 1966 the Troy City Commission approved the Maplelawn Industrial Park No. 2 Plat, finding it was in "compliance with Section 19(A)". The approved plat made no reference to a retention basin.

Storm water sewers were installed along Crooks Road in approximately 1978.

Shortly after the Crooks Road storm water sewer system was installed, Wattles and Moffett began seeking permission to fill the retention basin. Various discussions and correspondence over the years culminated in Wattles' then-legal-counsel, Robert Ziolkowski (now District Judge Ziolkowski), being expressly denied permission for Wattles to fill the basin in early October of 1985. At the time of the request, attorney Ziolkowski was informed by City officials that no fill permit would issue and that should Wattle fill without a permit he would be arrested.

On August 26, 1986, Wattles caused to be filed a three-count *Complaint* in this matter. Wattles' *Complaint* requested compensation for the City's taking of his property, that the City be enjoined from prohibiting him from filling and developing the property and that the City be enjoined from causing water to flow upon the 3.8 acres.

Both Wattles and the City of Troy filed motions for summary disposition in March of 1989. On January 4, 1990, the trial court, Oakland Circuit Judge Richard D. Kuhn, ruled upon the respective motions, finding in favor of the City of Troy and granting it summary disposition pursuant to MCR 2.116(C)(10) (*Opinion and Order*, Appendix A).

Jervis Wattles appealed the Circuit Court's dismissal to the Michigan Court of Appeals. On June 9, 1992, the Court of Appeals issued its per curiam *Opinion* (Appendix B) affirming the Circuit Court's *Opinion and Order*.

Jervis Wattles appealed the Michigan Court of Appeals' *Opinion* affirming the Circuit Court's *Opinion and Order* to the Michigan Supreme Court. On December 2, 1992, the Michigan Supreme Court entered its *Order* (Appendix C) Denying Jervis Wattles' Application for Leave to Appeal.

PROCEDURAL BACKGROUND

The trial court granted summary disposition in favor of Respondent City of Troy on the basis of Michigan Court Rule 2.116(C)(10), finding there was no genuine issue as to any material fact and that the City was entitled to a dismissal as a matter of law. A motion for summary disposition brought pursuant to Michigan Court Rule 2.116(C)(10) requires consideration of the pleadings, affidavits and other material supporting or opposing the motion, giving any reasonable doubt to the opposing party. *Hansman* v. *Imlay City Bank*, 121 Mich App 424 (1982). If reasonable minds might differ then summary disposition is not appropriate. *Id.*, p. 428. Furthermore, courts should be liberal in finding that a genuine issue of material fact does exist. *Id.*, p. 428.

In the trial court's *Opinion and Order* (Appendix A) dated January 4, 1990, ¶¶ 1-4 set forth the court's basis for granting summary disposition in favor of the City of Troy. Paragraph 1 of the January 4, 1990 *Opinion and Order* held the City did not "take" Wattles' property. Two reasons were given for this conclusion. First, the trial court held that the Plat Act, MCLA 560.19(a), required Wattles to provide adequate storm water drainage facilities in order to receive plat approval. Second, the court held the requirement of adequate storm water drainage facilities was a legitimate police power objective. In its per curiam *Opinion*, the Court of Appeals reiterated the Plat Act requirement that "adequate storm drainage facilities" be provided (*Opinion*, Appendix B) but seemingly did not base its holding on this. The Court of Appeals also agreed with the trial court that because the retention basin effectuated a "substantial public purpose" its requirement was not a taking. If there is a question of fact with regard to these two findings, then summary disposition in favor of the City was not appro-

priate. These issues are addressed in Section I of the Petition herein.

Paragraph 2 of the trial court's January 4, 1990 *Opinion and Order* found a genuine issue of material fact did not exist with regard to the adequacy of the retention basin. Despite the fact that Wattles did not raise this issue in his Brief on Appeal, the Court of Appeals addressed this issue and agreed with the trial court's conclusion. However, this finding is not relevant to the error claimed by Wattles with regard to the remainder of the trial court's *Opinion*. For instance, if the City's requirement that Wattles' use his property as a retention basin constitutes a taking, then it does not matter whether the retention basin could be reduced without causing flooding. If a taking has occurred, Wattles is entitled to compensation.

Paragraph 3 of the trial court's January 4, 1990 *Opinion and Order* found Wattles had failed to raise a genuine issue of material fact regarding the alleged promise by the City of Troy that the retention basin would be temporary. This issue was raised on appeal and rejected by the Court of Appeals. It is now addressed in Section II of this Petition.

Finally, in ¶ 4 of the January 4, 1990 *Opinion and Order* the trial court ruled the City did not need to dedicate the property since the retention basin was not for public use. This finding is relevant to Wattles' claim on appeal that the City has no enforceable interest in the property. Wattles claims there is no dedication *or other document* which gives the City a legal interest in the property. Accordingly, without a dedication or other written transfer of interest in the property, the City can only force Wattles to use the property as a retention basin by its power of eminent domain, which requires compensation to Wattles. Wattles moved for summary

disposition in his favor on this point before the lower court. However, his motion was denied, although the trial court did not specifically address the argument concerning lack of a written interest. This issue is addressed in Section III of the Petition herein.

Petitioner Jervis J. Wattles submits each of the three lower court rulings are clearly erroneous. Manifest injustice is obvious as Wattles has been denied the opportunity to present all of the facts to a jury regarding his fundamental constitutional rights.

CONCISE ARGUMENT FOR A WRIT OF CERTIORARI

Jervis Wattles has exhausted his appellate right with the Michigan courts. The Michigan courts have allowed the City of Troy to take Jervis Wattles' property without just compensation. The Michigan Supreme Court Order, and lower court holdings conflict with the U.S. Supreme Court holding in *Lucas* v. *South Carolina Coastal Council*, 112 Sup Ct 2886 (1992).

REASONS FOR GRANTING THE WRIT

I.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY'S REQUIREMENT THAT WATTLES USE HIS PROPERTY AS A RETENTION BASIS IS A TAKING?

A. Did Jervis Wattles Dedicate His Property To The City of Troy?

As indicated above, the Plat Act was in effect at the time of the creation of Maplelawn Industrial Park No. 2. § 19(a) of the Plat Act stated in pertinent part:

> "In determining the suitability of the land for platting purposes, the governing body shall give due consideration to adequate storm water drainage facilities, both within the lands proposed for platting, and to the outlet drainage facilities to carry storm water from the land as platted. If the governing body determines that adequate storm drainage facilities are not provided for within the land proposed for platting or that adequate outlet storm drainage facilities are not available adjacent thereto, it may reject the plat . . . . *In its certificate of approval, if granted, the governing body shall specify the plat as approved complies with the provisions of this section.* (Added 1961, Act 150, Eff. Sept. 8.)"
>
> MCL 560.19(a) (emphasis added)

Pursuant to this section of the Plat Act, the City of Troy could have rejected Wattles' plat if it had not provided for adequate storm water drainage facilities. The trial court and the Court of Appeals correctly noted that § 19(a) required Wattles to provide "adequate storm drainage facilities". However, § 19(a) also requires the governing body (Troy) to specify "*the plat as approved*" complies with the provisions of § 19(a). Accordingly, the City must certify the plat sets forth adequate storm water drainage facilities. It is undisputed that the City signed the plat and gave its "certificate of municipal approval" *without* any indication on the plat of the existence of a retention basin or for a requirement of a retention basin.[1] The Court of Appeals' *Opinion* simply fails to address the clear fact that the

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[1] **It is important to note that the plat does set forth various sewer easements for storm water drainage which run along the boundaries of the subdivision and its interior lots. Yet any notation or reference to a retention basin is glaringly absent.**

City approved the plat without a requirement of a retention basin being set forth on the plat itself. The "certificate of municipal approval" signed by the City Clerk on March 14, 1966, found on sheet 1 of 2 of the plat states:

> "This plat was approved by the City Commission of the City of Troy, Oakland County, Michigan at a meeting held March 14, 1966 *and is in compliance with Section 19(a)* and that the widths of lots is in compliance with the requirements of Section 30, Act 172 or 1929 as amended, and that additional security was deposited with the City for the installation of the remaining water and sanitary sewer facilities."
>
> (emphasis added)

The City acknowledged on March 14, 1966 that the plat conformed to § 19(a) of the Plat Act *despite the fact that the plat set forth no retention basin*. Despite this, the trial court found § 19(a) somehow required the existence of a retention basin (*Opinion and Order*, Appendix A). This completely flies in the face of plat itself which was signed by all parties involved in the creation of Maplelawn Industrial Park No. 2. The City gave its written approval in 1966 to the creation of Maplelawn Industrial Park No. 2 without a retention basin. The Court of Appeals simply failed to address Wattles' claim that Judge Kuhn committed clear error by finding that the Plat Act required a retention basin when the plat itself shows no basin.

B. Can The City Take Private Property To Further A "Police Power Objective" Without Compensating The Property Owner?

Paragraph 1 of the trial court's January 4, 1990 *Opinion and Order* states, ". . . the requirement of adequate storm water drainage facilities to prevent flooding

would clearly seem to be a legitimate police power objective". The trial court went on to state that summary disposition was appropriate based on this finding. The Court of Appeals agreed, stating:

> "Furthermore, it is our opinion that the requirement of a retention basis is justified as a reasonable means of effectuating a substantial public purpose, that being the prevention of flooding. We agree with the trial court, that the City did not 'take' plaintiff's land."
>
> Court of Appeals' per curiam *Opinion*, June 9, 1992, ¶ 2, page 2 (A-6)

The Court of Appeals' *Opinion* makes this statement without citing any supporting law.

The trial court and Court of Appeals' finding that the City can take a person's property without compensation when it is in furtherance of a "substantial public purpose" or "a legitimate police power objective" is simply contrary to the constitution and other laws. This error could not be more apparent. Clearly a municipality may take property when it is to support a legitimate police power objective or a substantial public purpose. However, such taking *must* be compensated. As the Michigan Supreme Court stated:

> "It is contended recourse may not be had to the power of eminent domain to acquire the land in question, the taking of which is or may be justified only under the police power of the state. Drain laws, under which the private property of the person may be taken from him against his will, are upheld only upon the ground that such drains are necessary for the public health. *Kinnie* v. *Bare*, 68 Mich 625. *Where property is taken for public health and safety, it cannot be*

> *taken without compensation, and there is no distinction between the power of eminent domain and police power in this regard."*
>
> *In Re Brewster Street Housing*, 291 Mich 313, 342; 289 NW 493 (1939) (emphasis added)

It makes no difference whether the City's actions are in furtherance of a police objective, a substantial public purpose or simply done pursuant to eminent domain, in the United States, private property cannot be taken without compensation. The trial court and Court of Appeals holding to the contrary constitute clear error.

The U.S. Supreme Court has recently developed a two prong analysis of takings. First, a government must compensate a property owner if there is a physical invasion of the owner's rights. Secondly, a taking occurs where a government regulation denies essentially all economically beneficial or productive use of land. *Lucas* v. *South Carolina Coastal Council*, 112 Sup Ct 2886 (1992).

Jervis Wattles has clearly sacrificed his property for the common good. His four acres of valuable property in a rapidly growing suburb are now a retention pond. The economically beneficial and productive uses of this land has been completely eliminated by the acts of the City of Troy.

In *Lucas*, this Court distinguished government regulation which, pursuant to police power, would prevent a land owner from harming neighboring land. Such regulation is not a taking. However, this is clearly not the case here. By developing his land, Jervis Wattles would actually have it conform to the surrounding area.

The Michigan Trial and Appellate Courts completely ignored the issue as to whether the City of Troy promised Jervis Wattles that he could fill and develop the property once sewers and drainage were present.

This promise is one of the sticks in the bundle of rights that constitute property ownership. Jervis Wattles' sworn affidavit that such a promise was made is uncontradicted. The Michigan courts have allowed the City of Troy to violate Wattles' constitutional rights through unfounded summary disposition.

II.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY PROMISED JERVIS WATTLES THAT THE USE OF HIS PROPERTY AS A RETENTION BASIN WOULD BE TEMPORARY?

In the lower court, Wattles raised the claim that he and his business partner, Paul Moffett (now deceased), were orally promised by Dick Graham, City Engineer for Troy, that the requirement of a retention basin would be temporary until such time as the City installed storm sewers along Crooks Road. This claim was supported by the Amended Affidavit of Jervis J. Wattles as well as his deposition testimony. The trial court found that Wattles' allegations regarding the alleged promise were insufficient to defeat the City's motion for summary disposition. The Court of Appeals agreed with the trial court's finding in this regard.

In *Vergote* v. *K-Mart Corporation*, 125 Mich App 48 (1983), the Court of Appeals reversed the Circuit Court's granting of summary disposition on facts markedly analogous to those herein. There plaintiff claimed K-Mart's representative made an oral representation that K-Mart would build a connecting road if necessary to receive dedication of two other roads, even though the written contract omitted the requirement to build the road. When K-Mart refused to build the road, Vergote sued. Vergote testified at deposition that K-Mart's official stated they would do: "Whatever we have to do to get

them dedicated even if it takes the loop road". *Id.*, p. 50. The Court of Appeals held this statement was sufficient to create a question of fact and defeat summary disposition.

It is crucial to focus on the fact that Wattles' Affidavit and deposition testimony were not contradicted by the City. The City pled no affidavit, deposition testimony or any other document contradicting Wattles' allegations. Despite this fact, the trial court disregarded Wattles' testimony and entered summary disposition in favor of the City, finding no dispute as to this fact. As this Court is well aware, summary disposition is relief which should be rarely granted and only where the facts when taken in the light most favorable to the non-moving party cannot support a verdict for the non-moving party. If the trier of fact were to believe Wattles' allegations regarding the City Engineer's promise then Wattles could prevail. Wattles simply wants his day in court. Just as in *Vergote*, summary disposition is not appropriate in light of Wattles' uncontradicted allegations.

In its Brief on Appeal before the Court of Appeals, the City argues the statute of frauds and parol evidence rule preclude Wattles' testimony concerning the oral promise. However, the Court of Appeals did not address this argument. The City relies on the plat to claim the parol evidence rule bars consideration of the oral promise. However, if the plat is all that can be considered, then the City has no basis to claim an interest in the subject property, as the plat fails to mention the retention basin.

Furthermore, the statue of frauds does not apply as the City never had an interest in the property, accordingly, the City transferred no interest when it promised Wattles he could fill the retention basin when storm sewers were built.

However, even if the statute of frauds or parol evidence rule were applicable, the statement would be appropriate under a theory of estoppel. Estoppel applies where:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only the enforcement of the promise."
>
> *Dunnan & Jeffrey, Inc.* v. *Gross Telecasting, Inc.*, 7 Mich App 113, 118 (1967) citing 1 Restatement Contracts, § 90

Wattles relied on the promise that the basin would be temporary and allowed the property to be platted and subdivided with the retention basin in existence. This reliance was to the detriment of Wattles in that he has been unable to use the property for a profitable use.

III.

DOES A GENUINE ISSUE OF MATERIAL FACT EXIST AS TO WHETHER THE CITY OF TROY HAS AN ENFORCEABLE INTEREST IN THE RETENTION BASIN?

At the time of the creation and platting of Maplelawn Industrial Park No. 2 in 1966 the Plat Act was in effect. Section 12 of the Plat Act stated:

> "There shall be printed on each plat a form of dedication, stating the name of the plat, that the lands embraced in it have been surveyed and platted and that the public streets, alleys and other public places shown on it are dedicated to the use of the public, that all public utility ease-

> ments shall be marked 'private easements' and are not dedicated to the use of the public . . . "
>
> MCLA 560.12

As pointed out above, the "Dedication" found on page 2 of the Maplelawn Industrial Park No. 2 Plat, fails to set forth any dedication by Wattles of Lot 11 for use of the public as a retention basins.

In the trial court, Wattles moved for summary disposition on the basis that § 12 of the Plat Act required dedication on the plat. Wattles also argued the City was never given an interest via any other written document.

The City argues the requirement of § 12 of the Plat Act that public places be dedicated on the plat does not apply to the Maplelawn Industrial Park No. 2 retention basin because the basin is not used by the public. The trial court and Court of Appeals agreed. In their *Response to Plaintiff's Brief In Opposition To Defendant's Counter-Motion For Summary Disposition*, the City claimed the retention basin detains only storm water runoff from the properties originally platted and sold by Wattles. In support of this assertion, the City cited the affidavit of Robert Quigley. However, review of Mr. Quigley's affidavit reveals no such supporting statement.

If the retention basin benefits the public, then § 12 of the Plat Act *requires* dedication. The City admits, and the Court of Appeals recognized, that the basin benefits the public by preventing flooding (per curiam *Opinion*, ¶ 10, p. 2; A-6). Review of Mr. Quigley's affidavit reveals no statement that only storm water run-off from Maplelawn Industrial Park No. 2 goes into the basin. Accordingly, there is, at a minimum, a question of fact as to whether the basin benefits the public. If it does, then summary disposition is appropriate *in favor of Wattles*, based on § 12 of the Plat Act.

Wattles' position is that § 12 of the Plat Act mandates that a written dedication referring to the existence of a retention basin be set forth in the Maplelawn plat in order for the City to be able to require Wattles to use his property as a retention basin. The City counters this position with an unsupported claim that the basin only benefits the properties on Maplelawn Industrial Park No. 2 and that therefore the basin does not benefit the public. This claim is not sufficient to defeat Wattles' right to have this matter determined at trial, and the trial court's reliance on the unsupported conclusion that the basin does not benefit the public was clear error.

Additionally, the Michigan Statute of Frauds mandates that interests in land may only be transferred in writing, MCL 566.106. One document exists relating to Maplelawn Industrial Park No. 2, which sets forth all the terms of the creation of Maplelawn and is signed by all interested parties, that is the plat. The plat is a full integration of the parties' intentions and as such cannot be modified by parol evidence as to prior understandings, *Erkileman* v. *Devletion*, 299 Mich 95; 299 NW 821 (1941); *Sattler* v. *Fisher Contracting Co.*, 30 Mich App 617 (1971). The plat makes no reference to use of Lot 11 as a retention basin. The City was never granted an interest in Lot 11 and its continued refusal to allow Wattles a fill permit constitutes taking without due process.

The City argues a memorandum dated March 14, 1966 grants it an interest in the retention basins. This memo is from the City Manager to the City Engineer and is not signed by Wattles or his partner.[2] However, the plat

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2 The City attached the memo to a March 21, 1966 Agreement signed by Wattles and Moffett, as well as various persons on behalf of the City. The Agreement states in pertinent part:

(*concluded on page 18*)

makes no reference to any outside documents and is unambiguous on its face that it is in compliance with § 19(a). Clearly summary disposition is not appropriate in favor of the City based on a document which is not on file with the County Register of Deeds and which is not referenced to by the plat. The plat is not ambiguous. If summary disposition was appropriate, it would have been in favor of Jervis Wattles on the basis that the plat is an unambiguous contract, signed by all parties, which failed to give the City any interest whatsoever in the disputed property. However, this was raised before the trial court on Wattles' motion for summary disposition and denied.

Jervis Wattles never dedicated Lot 11 of Maplelawn Industrial Park No. 2 to the use of the City or public, as required by § 12 of the Plat Act. In fact, no interest in Lot 11 was ever granted to the City. It is undisputed that Wattles has title to the land. Simply put, the City has no legal basis for taking Wattles' land without compensation. At a minimum a question of fact exists as to whether the retention basin benefits the public. How-

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(*continued from page 17*)

> "The owner agrees that he will at his own expense furnish and install all the public improvements specified in the attached Exhibit A."
>
> * * *
>
> (Agreement, attached Exhibit I, emphasis added)

The City claims the March 14, 1966 memo is the "Exhibit A", however, the memo is not otherwise identified in the Aqreement and the memo does not have a notation that it is "Exhibit A". The City has provided no evidence that indicates the memorandum is in fact the "Exhibit A". They have simply stapled the memorandum to the "Agreement". This question shows the obvious need for a trial on the merits so that all of the testimony and evidence may be considered by the trier of fact. In addition, the City has argued throughout this case that the retention basin is not for the "public". If this is so, then the memorandum cannot be Exhibit A as it references the basin, which the City strenuously argues is not a public improvement.

ever, even if it does not, the City is not entitled to summary disposition since it has never been conveyed any enforceable interest in the property. Questions of fact exist as to whether the retention basin needed to be dedicated and to whether the City ever received any interest in the property.

CONCLUSION

The Plat Act, specifically § 19(a) does not specifically require a retention basin. It is undisputed that the plat of Maplelawn Industrial Park No. 2 contains no reference whatsoever to the existence of a retention basin. The City of Troy approved the plat absent any requirement of a retention basin. Accordingly, the trial court's finding that the Plat Act required the existence of a retention basin constitutes clear error which has caused Jervis Wattles to suffer a manifest injustice.

The trial court's ruling that the City may take Wattles' property without compensation pursuant to its police power is also clear error. If the trial court were correct, then the state would have no requirement to compensate private property owners when their property is taken for the public good such as the construction of roads, sewers, etc.

A question of fact exists as to whether the City promised Jervis Wattles the retention basin property could be used once storm sewers were installed along Crooks Road. The City has never contradicted Wattles' assertion. Taking this uncontradicted fact in the light most favorable to Wattles, summary disposition in favor of the City is clear error.

The City has never been conveyed an interest in Jervis Wattles' property. It has no deed, easement, dedi-

cation or any other written conveyance wherein it was granted an interest which would preclude Jervis Wattles from using the property as he so desires. The City can only require Wattles to maintain the retention basin pursuant to its police power. However, by doing so, the City must pay Wattles just compensation for the taking.

The Michigan courts have allowed the City of Troy to unconstitutionally take Jervis Wattles' property. The courts have done so by ordering the unfounded summary disposition of Jervis Wattles' *Complaint.*

Petitioner Jervis J. Wattles requests this Court grant this Petition for Writ of Certiorari.

RELIEF SOUGHT

Petitioner Jervis J. Wattles requests this Court grant this Petition for Writ of Certiorari, and place this matter for hearing before the Supreme Court and remand this matter to the Michigan trial court, Oakland Circuit.

Respectfully submitted,

By: /s/ JOSEPH L. HARDIG, JR.
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/s/ BRADLEY S. STOUT

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Dated: March 2, 1993

APPENDIX TO PETITION FOR CERTIORARI

• • •

APPENDIX A

OPINION AND ORDER

(State of Michigan — Circuit Court — County of Oakland)

(Filed January 4, 1990)

(JERVIS J. WATTLES, Plaintiff, -v- THE CITY OF TROY, a Michigan municipal corporation, Defendant – No. 86 317481 CH)

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan, on this 4th day of January, 1990.

PRESENT: HONORABLE RICHARD D. KUHN,
CIRCUIT JUDGE.

This matter is before the Court on Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (10). Having reviewed the motions, answers and briefs, as well.as having heard oral argument, the Court makes the following determinations.

1. Defendant did not "take" the southerly 3.8 acres of lot 11 for use as a retention basin. In 1966, when Plaintiff applied to the Oakland County Plat Board for plat approval of Maplelawn Industrial Park No. 2, MCL 560.19a was in effect:

> In determining the suitability of the land for platting purposes, the governing body shall give due

> consideration to adequate storm water drainage facilities, both within the lands proposed for platting, and to the outlet drainage facilities to carry storm water from the land as platted If the governing body determines that adequate storm drainage facilities are not provided for within the land proposed for platting or that adequate outlet storm drainage facilities are not available adjacent thereto, it may reject the plat. If the governing body determines that the lands proposed for platting lie either wholly or in part within the flood plain of a river, stream, creek or lake, then it shall reject all or that part of the proposed plat lying within the flood plain area.In lieu of providing adequate storm water facilities within the lands proposed for platting, the plattor may enter into an agreement with the drain commissioner for the construction of such storm water improvements within a reasonable time and post a surety bond for the faithful performance of the agreement. In its certificate of approval, if granted, the governing body shall specify that the plat as approved complies with the provisions of this section. (Added 1961, Act 150, Eff. Sept. 8.)

Thus, Plaintiff had to provide adequate storm water drainage facilities in order to receive plat approval of his industrial park. Further, the requirement of adequate storm water drainage facilities to prevent flooding would clearly seem to be a legitimate police power objective.

2. Plaintiff has failed to raise a genuine issue of material fact regarding the adequacy of the retention basin. The observations of the non-expert adjoining lot owner that the basin almost always appears dry, does

not raise a fact issue, given that Defendant submitted an affidavit from its engineer stating that the basin would almost always appear dry if working properly.

3. Plaintiff has failed to raise a genuine issue of material fact regarding the City's alleged promise that he would be able to fill the land when local storm sewers were later installed on Crooks Road. His amended affidavit states only that he and his business partner agreed to use the disputed land as a temporary basin until the storm sewers were installed. Plaintiff made no specific allegations regarding who, on behalf of the City of Troy, entered into such an agreement with Plaintiff and his business partner, when or where the agreement was made, or the substance of the alleged agreement.

4. It does not appear that Defendant needed to dedicate the disputed land for public use on the plat, since the disputed land is not for public use. The basin is for the use of the properties platted and sold by Plaintiff.

5. Since Plaintiff has failed to raise a genuine issue of material fact, and Defendant is entitled to judgment as a matter of law, Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) must be granted. Accordingly, it is unnecessary to address Defendant's Motion pursuant to MCR 2.116(C)(7).

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is denied.

/s/ RICHARD D. KUHN,
CIRCUIT JUDGE

(Certification Omitted)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Filed June 9, 1992)

(JERVIS J. WATTLES, Plaintiff-Appellant, v CITY OF TROY, a Michigan municipal corporation, Defendant-Appellee – No. 125126)

Before: Wahls, P.J., and Jansen and T. G. Kavanagh,* JJ.

PER CURIAM.

Plaintiff, Jervis J. Wattles, appeals as of right from a January 4, 1990, opinion and order of the Oakland Circuit Court granting defendant, City of Troy's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm the order of the circuit court.

On appeal, plaintiff asserts that defendant's requirement that he permanently continue to maintain a retention basin on his property constitutes a taking, and that the trial court erred in holding otherwise. We disagree with plaintiff. A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Pantley* v *Garris, Garris & Garris, PC*, 180 Mich App 768, 773; 447 NW2d 864 (1989), lv den 435 Mich 871 (1990). The court must consider the pleadings, affidavits, depositions and other documentary evidence and must give the benefit of any reasonable doubt to the nonmoving party, drawing any reasonable inferences in favor of that party. *Id.* The nonmoving party has the burden of establishing that a genuine

---

*** Former Supreme Court Justice, sitting on the Court of Appeals by assignment.**

issue of material fact exists in response to a properly filed and supported motion for summary disposition. *Id.* A grant of summary disposition under subsection (C)(10) is proper only if the court is satisfied that no possible factual development could justify recovery by the nonmoving party. *Id.*

Plaintiff contends that the City of Troy's requirement that plaintiff use his property as a retention basin constitutes a "taking" of his property for which he should be justly compensated. As did the trial court, we find that there has been no taking of plaintiffs property by the City.

In effect in 1966, when plaintiff applied to the Oakland County Plat Board for plat approval, was MCL 560.19a; MSA 26.449(1), which required that plaintiff provide adequate storm drainage facilities in order to receive plat approval for his industrial park. Plaintiff claims that his agreement in 1966, to allow Lot 11 to be used as a retention basin, was contingent upon the City's promise that it would be used temporarily until local sewers could be installed.

Under Michigan law, a "taking" of private property for public use is not restricted to cases involving absolute conversion of private property, but also includes cases where the value of the property is destroyed by the action of the government or where the owner is excluded from use or enjoyment of his property or from any of the appurtenances thereto. *Blue Water Isles Co* v *DNR*, 171 Mich App 526, 535; 431 NW2d 53 (1988). Relevant factors to be examined include the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Id.*, p 536. A land use regulation may be justified where the government's action is reasonably necessary to the effectuation of a substantial public purpose. *Id.*

The evidence presented by plaintiff to the trial court was insufficient to support his claim of an uncompensated taking. Plaintiffs claim that he had an agreement with the City that the basin would only be temporary was unsupported. Plaintiffs amended affidavit stated only that he and his business partner, Paul Moffett had agreed that the basin would be temporary. Plaintiff never produced any evidence regarding the date of the alleged agreement with the City or the substance of the agreement. There was no evidence, beyond plaintiffs own allegations, to prove that an agreement existed outside of the scope of the plat act of 1929, MCL 560.19a; MSA 26.449(1).

Furthermore, it is our opinion that the requirement of a retention basin is justified as a reasonable means of effectuating a substantial public purpose, that being the prevention of flooding. We agree with the trial court, that the City did not "take" plaintiff's land.

Plaintiff also contends that the area surrounding Maplelawn Industrial Park 2 had adequate storm water drainage facilities based on the fact that an insignificant amount of water had accumulated in the retention basin over the past twenty-two years. To support this allegation, plaintiff submitted the affidavit of his neighbor, John McMullen, which stated that water appeared in the basin only after a very heavy rainfall However, this allegation was refuted by the City's engineer, Singh Bhayia, who stated that a properly functioning basin would appear predominantly dry, and would only hold noticeable amounts of standing water after a heavy rainfall. Moreover, the affidavit of McMullen simply repeats the allegations in plaintiffs complaint and fails to provide any evidence of the existence of a genuine issue of material fact as to whether a taking has occurred.

Plaintiff also contends that the plat on file with the Oakland County Register of Deeds does not reflect a dedication of Lot 11 for public use as a retention basin as required by MCL 560.12; MSA 26.442. The trial court held that the City did not have to dedicate the disputed land for public use on the plat because the basin is for the use of the properties platted and sold by plaintiff, and not for public use. We agree with the trial court.

A dedication is an appropriation of land to some public use, accepted for such use by or in behalf of the public. *Gum* v *Delhi Township*, 8 Mich App 278, 282; 154 NW2d 598 (1967). While there is a benefit to the public resulting from the existence of the retention basin, that being the prevention of flooding, the retention basin is not used by the public generally. The basin was required by law to be maintained upon the proposed area of development by plaintiff, and is for the use of the properties platted and sold by plaintiff. The retention basin has not been appropriated for public use, and the City was not required to dedicate the land in question on the plat.

Affirmed.

/s/ Myron H. Wahls
/s/ Kathleen Jansen
/s/ Thomas G. Kavanagh

APPENDIX C

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered: December 2, 1992)

(JERVIS J. WATTLES, Plaintiff-Appellant, v CITY OF TROY, a Michigan municipal corporation, Defendant-Appellee – SC: 94219; COA: 125126; LC: 86-317481-CH)

Michael E Cavanagh, Chief Justice; Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert E Griffin, Conrad L. Mallett, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(Certification Omitted)

(2)

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-475

In The

Supreme Court of the United States

October Term, 1993

JERVIS J. WATTLES,
Petitioner,
vs.
THE CITY OF TROY,
a Michigan municipal corporation,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

A. DID THE LOWER COURTS ERR, IN FINDING THAT THE PLAT ACT DID NOT REQUIRE THE RETENTION BASIN BE IDENTIFIED ON THE PLAT ITSELF?

B. WAS THE REQUIREMENT OF AN ADEQUATE STORM WATER DRAINAGE FACILITY TO PREVENT FLOODING, WHICH MUST BE MET PRIOR TO PLAT APPROVAL, A LEGITIMATE POLICE POWER OBJECTIVE AND WAS THE FINDING BY THE LOWER COURTS THAT THE REGULATION DOES NOT AMOUNT TO A "TAKING" ERROR?

II.

DID THE PETITIONER FAIL TO PRESENT A GENUINE ISSUE OF MATERIAL FACT WITH HIS ALLEGATION OF A VERBAL PROMISE MADE BY AN UNKNOWN REPRESENTATIVE OF THE RESPONDENT?

III.

WAS THE CITY OF TROY REQUIRED TO DEDICATE THE 3.8 ACRES OF LAND OF KNOWN AS THE RETENTION BASIN?

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS INVOLVED i

INDEX OF AUTHORITIES iv

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS 1

COUNTER-STATEMENT OF PROCEDURAL BACKGROUND 4

SUMMARY OF THE ARGUMENT FOR DENYING THE WRIT OF CERTIORARI 7

ARGUMENTS FOR DENYING THE WRIT OF CERTIORARI:

I.A. NO GENUINE ISSUE OF ANY MATERIAL FACT EXISTS AND THEREFORE, THE LOWER COURTS DID NOT ERR IN FINDING THAT THE PLAT ACT DID NOT REQUIRE THAT THE RETENTION BASIN BE IDENTIFIED ON THE PLAT ITSELF. 8

I.B. THE REQUIREMENT OF AN ADEQUATE STORM WATER DRAINAGE FACILITY TO PREVENT FLOODING, WHICH MUST BE MET PRIOR TO PLAT APPROVAL, IS A LEGITIMATE POLICE POWER OBJECTIVE AND THE FINDING BY THE LOWER COURTS THAT THE REGULATION DOES NOT AMOUNT TO A "TAKING" IS NOT ERROR. 11

II. THE TRIAL COURT'S RULING IS NOT CLEARLY ERRONEOUS WHERE THE PETITIONER FAILED TO PRESENT A GENUINE ISSUE OF MATERIAL FACT BY ITS ALLEGATION OF A VERBAL PROMISE MADE BY AN UNKNOWN REPRESENTATIVE OF THE RESPONDENT. 14

III. THE CITY OF TROY DID NOT DEDICATE NOR WAS IT NECESSARY TO DEDICATE THE 3.8 ACRES OF LAND KNOWN AS THE RETENTION BASIN. 16

CONCLUSION 19

PRAYER FOR RELIEF 20

INDEX OF AUTHORITIES

CASES:

Lucas v *South Carolina Coastal Council*, 112 S.Ct. 2886 (1992) 8, 11

Pantley v *Garris, Garris & Garris, PC*, 180 Mich. App. 768; 447 N.W.2d 864 (1989), lv den. 435 Mich. 871 (1990) 7

Vergote v *K-Mart Corporation*, 125 Mich. App. 48; 336 N.W.2d 229 (1983) 16

MICHIGAN STATUTE:

MCL 560.19a; MSA 26.449(1) 6-7, 8-9, 15, 18

MICHIGAN COURT RULE:

MCR 2.116(C)(10) 4, 5

No. 93-475

In The

Supreme Court of the United States

October Term, 1993

JERVIS J. WATTLES,
Petitioner,

vs.

THE CITY OF TROY,
a Michigan municipal corporation,
Respondent.

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Respondent, City of Troy, Michigan, submits that the Petitioner's statement of material facts and proceedings needs correction and supplementation.

In 1966, Petitioner's corporate entity, M & W Development Co., platted two industrial subdivisions in Section 29 of the City of Troy, Michigan. They were named Maplelawn Industrial Park and Maplelawn Industrial Park No. 2. The Petitioner owned, platted, and sold 108 acres of property in Section 29 called Maplelawn Industrial Park and Maplelawn Industrial Park No. 2.

The retention basin, which is the subject of dispute, comprises 3.8 acres within Maplelawn Industrial Park No. 2 and serves to detain storm water from both of the Petitioner's developed industrial subdivisions.

Retention basins are required for all developments in the City of Troy, Michigan. When development occurs, the natural agricultural run off and placement of storm

water is disturbed. Therefore, storm water must be detained to prevent flooding to areas located downstream of the newly developed area. No adequate storm sewer system exists in the City of Troy, Michigan to accommodate storm water run off from new developments. Furthermore, the capacity of existing drains are restricted by regulations of the U.S. Army Corps of Engineers. Therefore, retention basins are as absolutely necessary now as they were in 1966.

It is an undisputed fact that prior to plat approval of the development of the Petitioner's lands, the Petitioner was required and did, therefore, submit an engineering plan which was prepared by the Petitioner's agent, Neree D. Alix, Professional Engineer.

It is equally undisputed that in the plan submitted by the Petitioner's own engineer, dated October 12, 1966, revised November 15, 1966, a "storage basin on Lot 11" and "storage basin easement" is indicated. A revised and nearly identical plan was approved by the Oakland County Drain Commission on January 27, 1966, which likewise indicated a storage basin. **But for the approved engineering plan containing a retention basin, the plat would not have been approved.** Furthermore, the size and location of the retention basin in Lot 11 was decided on by the Petitioner's engineer.

On March 21, 1966 an Agreement was entered into between the Petitioner and Respondent wherein the Petitioner agreed to provide for the retention basin. Petitioner's contention that an adequate underground storm system now exists to serve Maplelawn Industrial Park and Maplelawn Industrial Park No. 2 is unfounded. The Petitioner did not and cannot present evidence to refute the affidavit of Robert Quigley, now retired City Engineer. A retention basin is still necessary to detain storm water run off from the properties of the Petitioner.

Petitioner never objected to the requirement or questioned the size or location of the retention basin in Lot 11 for twelve years.

In September 1978, the Petitioner inquired about reducing the size of the basin. Petitioner's request was reviewed by the City of Troy Engineering Department. More information was required of Petitioner and numerous comments were made.

The Petitioner was not heard from again until July of 1982. At that time the Petitioner was told that an engineering survey, based on current measurements of the basin were needed for a review of the requested reduction in the retention basin's size. The Petitioner never presented the recommended engineering survey.

The Respondent has always maintained that if Petitioner presents current engineering data which clearly shows that the basin may be reduced without causing flooding, then a reduction of the retention basin would be recommended.

Instead of presenting the engineering data, the Petitioner commenced the present litigation. The Petitioner has argued that these facts are irrelevant, yet, the Petitioner bases his entire claim to this Court that he has been denied all economic and productive use of his land. It is apparent that the Petitioner wants to have his cake and eat it, too.

The Petitioner, in his Statement of Material Proceedings and Facts to this Court, has now identified the previously unknown city employee and has presented information of an alleged discussion between Mr. Graham and the Petitioner. The Petitioner has also cited this Court to deposition testimony. **Neither the substance of the alleged discussion, the name of the Respondent's employee, nor the deposition testimony was presented to the trial court.**

The Petitioner, in his Statement of Material Proceedings and Fact to this Court, has alleged that a three count Complaint in this matter was filed on August 26, 1986. It should be noted for the record that the Petitioner's complaint was superseded by the four-count Amended Complaint filed on August 27, 1987.

On January 4, 1990, the trial court granted the Respondent's Motion for Summary Disposition.

The Petitioner appealed and on June 9, 1992, the Michigan Court of Appeals affirmed the dismissal of the Petitioner's complaint.

The Petitioner then filed an Application for Leave to Appeal with the Michigan Supreme Court.

On December 2, 1992, the Michigan Supreme Court denied the Application for Leave to Appeal because the Court was "not persuaded that the questions presented should be reviewed by this Court."

The Petitioner has now sought review with this Court.

COUNTER-STATEMENT OF PROCEDURAL BACKGROUND

On or about March 6, 1989, the Petitioner served the City of Troy, Michigan with a Motion for Summary Disposition and Brief in Support of Summary Disposition. The Petitioner's Motion was brought pursuant to MCR 2.116(C)(10) which provides that: "Except for the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

On April 4, 1989, The City of Troy answered the Petitioner's Motion for Summary Disposition and on April 15, 1989, the City of Troy filed a Counter-Motion for Sum-

mary Disposition, which also cited MCR 2.116(C)(10) and alleged that there was no genuine issue as to any material fact and that the City of Troy was entitled to judgment as a matter of law. In support of the Motion for Summary Disposition, the City of Troy filed a brief and attached the affidavit of Robert Quigley, the then City Engineer together with other supporting documents. In the City of Troy's Response to the Petitioner's Brief in Opposition to the City of Troy's Counter-Motion for Summary Disposition, the affidavit of Robert Quigley was resubmitted as well as an affidavit by Singh Bhatia, a Professional Engineer on the city's staff.

The only evidence submitted by the Petitioner in support of his Motion for Summary Disposition and counter to the City of Troy's Motion for Summary Disposition was the affidavit and amended affidavit of the Petitioner and an affidavit by John McMullan, who was a nearby landowner and who did not give an expert opinion.

The Petitioner did not file any deposition testimony or otherwise attempt to substantiate any claimed "verbal agreement" between himself and some unknown City of Troy employee.

Based upon the evidence presented, the trial court issued its OPINION AND ORDER, dated January 4, 1990.

The trial court denied the Petitioner's request for Summary Disposition and granted the Summary Disposition in favor of the City of Troy. The trial court ruled that there was no genuine issue of any material fact that:

1) The Petitioner was required by statute to provide for adequate storm water facilities in his proposed development;

2) The statutory requirement was a legitimate police power objective;

3) The City of Troy did not "take" the Petitioner's land;

4) The retention basin was in fact necessary to contain storm water drainage for the Petitioner's property;

5) The Petitioner did not present any evidence of an oral promise between himself and the City of Troy, rather, the Petitioner only provided proof that he had agreed to the retention basin as a temporary measure, and;

6) The Plat Act did not require that the retention basin be dedicated for public use because the land is not for public use.

The Court of Appeals affirmed the triai court's ruling and held that:

1) The state statute, MCL 560.19a;MSA 26.449(1) required that the Petitioner provide adequate storm drainage facilities in order to receive plat approval for his industrial park;

2) The retention basin is justified as a reasonable means of effectuating a substantial public purpose,to-wit: the prevention of flooding;

3) The Petitioner's land was not taken;

4) The retention basin was in fact necessary to contain the storm water drainage for the Petitioner's property and the Petitioner failed to present sufficient evidence to the contrary;

5) The Petitioner only presented his amended affidavit that he had agreed to the retention basin on a temporary basis, no substantive evidence was submitted in support, and;

6) There was no requirement that the retention basin be dedicated because the basin was re-

quired by law to be maintained upon the proposed area of development and was for the use of the properties platted and sold by the Petitioner and not for public use.

The Michigan Supreme Court denied the Petitioner's Application for Leave to Appeal because they were "not persuaded that the questions presented should be reviewed by this Court".

For the reasons enunciated by the trial court, Court of Appeals and Michigan Supreme Court, the Respondent requests that this Court deny the Petitioner's Writ of Certiorari.

SUMMARY OF THE ARGUMENT FOR DENYING THE WRIT OF CERTIORARI

The Petitioner has exhausted his appellate rights with the Michigan court system.

Three Michigan courts have carefully and thoroughly reviewed all the evidence presented by the Petitioner, the applicable statutes and case law.

To obtain an order of Summary Disposition, the trial court must give any reasonable doubt to the nonmoving party and must be satisfied that no possible factual development could justify recovery for the nonmoving party. *Pantley* v *Garris, Garris & Garris, PC*, 180 Mich. App. 768; 447 N.W.2d 864 (1989), lv den. 435 Mich. 871 (1990). The Petitioner was provided with a full opportunity to rebut and present any and all evidence in support of his motion for Summary Disposition and in opposition to the Respondent's motion for Summary Disposition. Yet, the Petitioner was unable to present a genuine issue of fact which would necessitate a trial on the merits.

The Petitioner's request for Writ of Certiorari on the basis that the Michigan courts have decided this case contrary to this Court's holding in *Lucas* v *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), should be denied for the reason that the Michigan courts' decisions were in accordance with the U.S Supreme Court decision.

ARGUMENTS FOR DENYING THE WRIT OF CERTIORARI

I.

A. NO GENUINE ISSUE OF ANY MATERIAL FACT EXITS AND THEREFORE, THE LOWER COURTS DID NOT ERR, IN FINDING THAT THE PLAT ACT DID NOT REQUIRE THAT THE RETENTION BASIN BE IDENTIFIED ON THE PLAT ITSELF.

The answer to the Petitioner's question: "Did Jervis Wattles Dedicate His Property To The City of Troy?", is no. The City of Troy was not required to accept a dedication of the Petitioner's land for public use because the land was not appropriated for public use.

While the Petitioner cited the beginning portion of the applicable Michigan statute, MCL 560.19a; MSA 26.449(1), as it read in 1966 and the ending portion of it, the Petitioner failed to include the relevant section of the statute:

> In lieu of providing adequate storm water facilities within the lands proposed for platting, the plattor **may enter into an agreement** with the drain commissioner for the construction of such storm water improvements within a reasonable time and **post a surety bond** for the faithful performance of the agreement. **In its certificate of**

> **approval, if granted, the governing body shall specify that the plat as approved complies with the provisions of this section.** [Emphasis added]

The agreement procedure as set forth in MCL 560.19a; MSA 26.449(1) was followed in the instant case.

On March 21, 1966, the City of Troy and M&W Development Company (Petitioner) entered into an Agreement whereby the Petitioner agreed, as a condition precedent to plat approval, to the installation of the water retention basin.

The Certificate of Municipal Approval, as it appears on the Plat, is reprinted:

> This plat was approved by the City Commission of the City of Troy, Oakland County, Michigan at a meeting held March 14, 1966 and is in compliance with Section 19A, and that the widths of lots is in compliance with the requirements of Section 30, Act 172 of 1929 as amended, and that adequate security has been deposited with the City for the installation of the remaining water and sanitary sewer facilities.

The trial court and the Court of Appeals correctly ruled that there is no genuine issue as to any material fact that the existence of the retention basin was necessary to plat approval.

The Court of Appeals ruled:

> **The basin was required by law to be maintained upon the proposed area of development by plaintiff,** and is for the use of the properties platted and sold by plaintiff. [Emphasis added]

The fact that the plat does not indicate on its face the retention basin is not disputed. The plat does not reflect the retention basin. As a matter of law and pur-

suant to MCL 560.19a; MSA 26.449(1), reference to the retention basin was not required.

The Petitioner's statement in his Petition for Writ of Certiorari, that: "The City gave its written approval in 1966 to the creation of Maplelawn Industrial Park No. 2 without a retention basin", is false. (See page 10 of Petitioner's Writ) The Petitioner well knows, and in fact admitted in his Motion for Summary Disposition in paragraph 4 that the Petitioner's property would need to be served by a retention basin:

> Maplelawn Industrial Park number 2 was created in 1966, the founder being Jervis J. Wattles and Paul B. Moffett. At the time of the initial development of Maplelawn Industrial Park number 2, Wattles and Moffett allowed the southerly 3.8 acres of Lot 11 to be used as a retention basin.

Thus, the Petitioner's claim that the trial court "committed clear error by finding that the Plat Act required a retention basin when the plat itself shows no basin" is defective. The Plat Act did not require that the plat reflect the location, size, or area of the retention basin. The Plat Act allowed for the approval of a proposed plat, without an indication of storm water drainage, if the parties entered into an agreement to provide the facilities in the future.

In this case, the Motion for Summary Disposition was granted to the City of Troy because there was no genuine issue of material fact that the Petitioner "had to provide adequate storm water drainage facilities in order to receive plat approval of his industrial park." The Respondent has not denied this. Instead, the Petitioner seeks to circumvent the statutory requirement and rescind the plat approval on the basis that the retention basin isn't indicated on the plat, ignoring the

fact that the Plat Act does not require the indication on the plat itself.

The Petitioner's argument was not supported by fact or law and therefore was rejected by the trial court, Court of Appeals and Michigan Supreme Court.

I.

B. THE REQUIREMENT OF AN ADEQUATE STORM WATER DRAINAGE FACILITY TO PREVENT FLOODING, WHICH MUST BE MET PRIOR TO PLAT APPROVAL, IS A LEGITIMATE POLICE POWER OBJECTIVE AND THE FINDING BY THE LOWER COURTS THAT THE REGULATION DOES NOT AMOUNT TO A "TAKING" IS NOT ERROR.

The trial court ruled:

> Thus, Plaintiff had to provide adequate storm water drainage facilities in order to receive plat approval of his industrial park. Further, the requirement of adequate storm water drainage facilities to prevent flooding would clearly seem to be a legitimate police power objective.

The trial court's ruling reflects the understanding that the retention basin was necessary as a condition precedent for plat approval and that the condition precedent was a reasonable and legitimate police power objective.

The Petitioner cites to *Lucas*, *supra*, and argues that he has lost all economic benefit of his property from the regulation and the necessity of the retention basin.

In *Lucas*, *supra* at 812, this Court identified two "discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first, involved regulation which caused a property owner to suffer a physical invasion of his property. The second,

involved situations where the regulation denied "all economically beneficial or productive use of land". *Lucas*, *supra* at 813.

What must be remembered is that the Petitioner owned and platted 108 acres of land into what is now referred to as Maplelawn Industrial Park and Maplelawn Industrial Park No. 2. In order to insure that the development of the Petitioner's property would not endanger other properties and would retain its own storm water drainage, the retention basin was necessary.

The City of Troy did not plunder the Petitioner's land. The City of Troy regulated the usage of 3.8 acres of 108 acre parcel, which was based in part on the type of development proposed and created by the Petitioner. The trial court and the Court of Appeals understood the distinction.

The Petitioner was required by MCL 590.19a to provide for adequate storm water facilities within the lands proposed for platting. Storm water retention basins are required by MCL 590.19a where they are deemed necessary.

It is an undisputed fact that no adequate underground storm system exists in the City of Troy to accommodate new development. Storm water retention basins are always required by the City of Troy, Michigan and by the Oakland County Drain Commission prior to plat approval. Adequate storm water retention was a prerequisite to development and marketability of the Petitioner's land. Therefore, nothing has been "taken" from the Petitioner.

The Petitioner has profited from the sale of every parcel of land in both industrial subdivisions.

The Petitioner, by and through his own engineer, determined the location of the retention basin which

Petitioner presented for the new development of the area.

Petitioner's situation of having sold all parcels of land except the retention basin, needed to detain storm water for those parcels sold, is self-created and not a taking by the Respondent.

Therefore, the Petitioner's claim that he has been denied all economic beneficial and productive uses of his land is inaccurate.

Furthermore, the Petitioner's claim that the development of the 3.8 acres, would not harm neighboring land was not directly at issue at the trial court level. The trial court did however, hold that the Petitioner failed to raise a genuine issue of material fact regarding the necessity of the retention basin. Specifically, the trial court held that:

> The observations of the non-expert adjoining lot owner that the basin almost always appears dry, does not raise a fact issue, given that Defendant submitted an affidavit from its engineer stating that the basin would almost always appear dry if working properly.

The Court of Appeals also commented on this issue:

> Plaintiff contends that the area surrounding Maplelawn Industrial Park 2 had adequate storm water drainage based on the fact that an insignificant amount of water had accumulated in the retention basin over the past twenty-two years . . . the affidavit of McMullen simply repeats the allegations in plaintiffs complaint and fails to provide any evidence of the existence of a genuine issue of material fact as to whether a taking has occurred.

Therefore, the trial court and Court of Appeals correctly ruled that there is no genuine issue as to any material fact and the Respondent was entitled to judgment as a matter of law.

II.

THE TRIAL COURT'S RULING IS NOT CLEARLY ERRONEOUS WHERE THE PETITIONER FAILED TO PRESENT A GENUINE ISSUE OF MATERIAL FACT BY ITS ALLEGATION OF A VERBAL PROMISE MADE BY AN UNKNOWN REPRESENTATIVE OF THE RESPONDENT.

The Petitioner's legal theory is grounded on the "unlawful taking" of the Petitioner's property a portion of which was reserved for a water retention basin for purposes of plat approval and development.

The Petitioner claims that the lower courts erred in not allowing the Petitioner his day in court based upon an issue of fact raised by his affidavit.

The relevant portion of the amended affidavit of the Petitioner is as follows:

> 2. In 1966 my business partner, Paul B. Moffet, and I created and developed Maplelawn Industrial Park Number 2. At the time of the development of Maplelawn, Moffet and I agreed to use the southerly 3.8 acres of Lot 11 as a temporary retention basin until the City of Troy installed storm sewers along Crooks Road. [underline appears in original]

The trial court reviewed the amended affidavit of the Petitioner, and determined that the amended affidavit:

> . . . states only that he and his business partner agreed to use the disputed land as a temporary basin until the storm sewers were installed.

> Plaintiff made no specific allegations regarding who, on behalf of the City of Troy, entered into such an agreement with Plaintiff and his business partner, when or where the agreement was made, or the substance of the alleged agreement Plaintiff-Appellant alleges.

The Court of Appeals ratified the trial court's rationale and held:

> Plaintiff's claim that he had an agreement with the City that the basin would only be temporary was unsupported. Plaintiff's amended affidavit stated only that he and his business partner, Paul Moffet, had agreed that the basin would be temporary. Plaintiff never produced any evidence regarding the date of the alleged agreement with the City or the substance of the agreement. There was no evidence, beyond plaintiff's own allegations, to prove that an agreement existed outside of the scope of the plat act of 1929, MCL 560.19a; MSA 26.449(1).

While the Petitioner did attach a portion of his deposition to his brief on appeal to the Court of Appeals and in his Leave to Appeal to the Michigan Supreme Court, a thorough review of the documents filed with the trial court reveals that the deposition testimony **was not** presented to the trial court. Furthermore, according to the documents filed at the time of the Motion for Summary Disposition, the name of "Dick Graham, City Engineer for Troy" was not provided or mentioned by the Petitioner and the Petitioner never argued that there was an oral promise.

The Petitioner now asks this Court to "focus" on the fact that the City allegedly did not contradict the Petitioner's "evidence" and thereafter bootstraps his argument that there is a genuine issue of material fact.

It was the Petitioner's lack of evidence and lack of "genuine fact" which allowed the imposition of summary disposition.

The Petitioner takes the affidavit, which makes no mention of who entered into the agreement, when the agreement occurred, the full substance of the agreement etc., and magically translates it into oral promise.

The Petitioner's unsubstantiated and vague affidavit was refuted and negated by the Respondent by 19½ years of reality.

The lower courts properly ruled that the Petitioner did not present any relevant evidence to raise a genuine issue as to any material fact. The Petitioner's reference to *Vergote* v *K-Mart Corporation*, 125 Mich. App. 48; 337 N.W.2d 229 (1983), and its ruling is not controlling. In *Vergote, supra*, the plaintiff had specifically alleged that an oral promise was made by the defendant. The plaintiff in *Vergote, supra*, also presented his deposition testimony which the court believed raised a genuine issue of material fact.

The Petitioner's evidence was lacking even viewed in the light most favorable to the Petitioner. Therefore, no error was committed.

III.

THE CITY OF TROY DID NOT DEDICATE NOR WAS IT NECESSARY TO DEDICATE THE 3.8 ACRES OF LAND OF KNOWN AS THE RETENTION BASIN.

The Petitioner's land known as the retention basin located on Lot 11 of Section 29 was not dedicated to the public for public use.

The retention basin is not used by the public. Obviously, there is a benefit to the public by the retention

basin's existence, however, the size, location and actual existence depended on the proposed development of the surrounding lands owned by the Petitioner.

As stated by Robert Quigley, Professional Engineer, retired City Engineer, in ¶6 of his affidavit:

> A basin for storm water retention was and is necessary in Maplelawn Industrial Park No. 2 to provide for the retention of storm water **due to the development of other parcels of land by Mr. Wattles in the industrial subdivision.** [Emphasis added].

The Petitioner's allegation that the City of Troy misstated a fact to the trial court in its Motion for Summary Disposition is in error.

The retention basin was necessarily required, by law and fact, to be maintained based upon the proposed development of the Petitioner's land. The Petitioner does not deny this. The City of Troy did not acquire an interest in the property as the Petitioner continues to contend.

The Petitioner owned, platted, and sold 108 acres of property in Section 29 called Maplelawn Industrial Park and Maplelawn Industrial Park No. 2.

The retention basin comprises 3.8 acres within Maplelawn Industrial Park No. 2 and serves to detain storm water from both of the Petitioner's developed industrial subdivisions.

The benefit to the public is that the water run off from the Petitioner's lands will be retained in the water retention basin instead of flowing downstream to inadequate storm water drainage facilities.

The retention basin, in essence, is a requirement that the Petitioner's land, as developed, provide for its own

remedy to the storm water drainage problem confronted by all land users and developers.

Furthermore, the Petitioner has been informed on numerous occasions that if he presented engineering plans which demonstrated compliance with applicable codes and ordinances, a reduction in the size of the retention basin may be affected.

The trial court properly ruled and the Court of Appeals correctly affirmed that there exists no genuine issue of any material fact that the retention basin is for the use of the properties as platted and sold by the Petitioner and a dedication of the land in question was not necessary.

The Petitioner now claims that the City of Troy has an interest in the retention basin based upon a memorandum dated March 14, 1966. The March 21, 1966 Agreement entered into between the Petitioner and the City of Troy is the same type of agreement anticipated by the Plat Act, MCL 560.19a; MSA 26.449(1), which is again recited in part for the Court:

> In lieu of providing adequate storm water facilities within the lands proposed for platting, the plattor **may enter into an agreement** with the drain commissioner for the construction of such storm water improvements within a reasonable time and **post a surety bond** for the faithful performance of the agreement.

Thus, the Plat Act specifically allowed for an agreement of the sort involved between the Petitioner and the City of Troy and is not in conflict with the Michigan Statute of Frauds.

The Petitioner attacks the written agreement entered into between the City of Troy and the Petitioner, yet did not raise this issue with the trial court. Perhaps,

because the Petitioner knows full well that the agreement was entered into and was complied with by the Petitioner.

CONCLUSION

The Plat Act required that the Petitioner provide for adequate storm water drainage before the planned development of his land could be approved. This was undisputed.

The Petitioner in fact complied with the requirement and provided for a retention basin, 3.8 acres in size, to accommodate his 108 acre area of development.

The Plat Act did not require that the retention basin be identified within the plat itself.

The Plat Act provided for the approval of a proposed plat before the storm water drainage was completed by the submission of an Agreement to that effect.

The Petitioner complied with the requirements of the Plat Act, entered into an Agreement and created the necessary retention basin.

The alleged verbal agreement was summarily dismissed by the lower courts because the Petitioner never presented any evidence that an "oral promise" existed. This is not error.

The fact remains that the Petitioner has developed the full 108 acres of his land and the retention basin is just as necessary now as it was back in 1966.

The Petitioner has been told repeatedly that if he could submit data that would allow a reduction in the size of the retention basin, the City of Troy would act upon such a request. The Petitioner has refused to accept the offer and instead wants the City of Troy to

purchase the retention basin on the theory of "taking" without compensation.

The trial court and Court of Appeals did not err and the Michigan Supreme Court rightfully found that the Petitioner's arguments are not supported by fact or law.

PRAYER FOR RELIEF

Therefore, the Respondent respectfully requests that this Honorable Court affirm the trial court and Court of Appeals decision, deny the Petitioner's request for Writ of Certiorari, and order any other relief as this Court deems just and equitable, including reasonable attorney fees expended by the Respondent in the defense of this matter.

Respectfully submitted,

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